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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 266

WILLIAM ALFRED LUCKING and
MARGARET HOLMES DAVIS,
Petitioners,
vs.
FIRST NATIONAL BANK-DETROIT,
a National Banking Association, and
NATIONAL BANK OF DETROIT,
a National Bank Association,
Respondents

BRIEF OF RESPONDENT, FIRST NATIONAL BANK-DETROIT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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RESPONDENTS' COUNTER-STATEMENT

This is a derivative class action instituted by the plaintiffs-petitioners in the State Court for the State of Michigan on behalf of themselves and all other stockholders and depositors of First National Bank-Detroit, an insolvent national banking association (R. p. 2). The action was

removed from the State Court to the Federal District Court for the Eastern District of Michigan, Southern Division, by both of the defendants-respondents (R. p. 44).

After removal, both defendants-respondents filed their separate motions to dismiss on the principal ground that the complaint failed to allege a proper demand by the plaintiffs-petitioners upon the Receiver of First National Bank-Detroit to institute the action, and an improper or unreasonable refusal on his part to do so (R. pp. 61, 80). The plaintiffs-petitioners thereupon filed their motion to remand the case to the State Court (R. p. 56).

The motion to remand and the motions to dismiss were heard together. The motion to remand was denied, and the motions to dismiss were granted (R. pp. 59, 111).

On appeal to the Circuit Court of Appeals for the Sixth Circuit, the orders of the District Court were affirmed by an order entered on April 21, 1944 (R. p. 129). The opinion of the Circuit Court of Appeals is found on pages 130 and 131 of the printed record and in *Lucking v. First National Bank-Detroit,* 142 F. (2d) 528. The application for ceriorari is to review this order of the Circuit Court of Appeals.

As noted by petitioners on page 5 of their petition and by the Circuit Court of Appeals in its opinion (R. 130), this is the third case of the same character instituted by the same plaintiffs against the same defendants. Both of the earlier cases were originally instituted in the Federal District Court for the Eastern District of Michigan, were dismissed on motion and the dismissal affirmed by the Sixth Circuit Court of Appeals. The opinions of the Circuit Court of Appeals are both reported under the title of *Lucking v. Delano,* and are found in 117 F. (2d) 159 and 129 F. (2d) 283.

Mr. William Alfred Lucking is both one of the petitioners herein and also the attorney for the petitioners. Since the First National Bank-Detroit closed its doors on February 11, 1933, Mr. Lucking has beleaguered the Receiver and the Bank with a deluge of litigation, of which the three cases referred to herein are but a small part.* In the second of the series of three cases of which this is one, *Lucking v. Delano*, 129 F. (2d) 283, and in the instant case neither Mr. Lucking, nor any other counsel, appeared before the United States Circuit Court of Appeals in either instance to argue on behalf of the complainants.

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*Some of the other litigation instituted by Lucking against the First National Bank-Detroit, or its Receiver, and determined unfavorably to Mr. Lucking is as follows:

Lucking v. Delano, Comptroller of the Currency, 122 Fed. (2d) 21 (C. C. A. for D. C.);

Lucking v. Schram, Receiver, First National Bank-Detroit, 117 Fed. (2d) 160;

Barbour v. Thomas, Receiver, First National Bank-Detroit, 7 Fed. Supp. 271, affirmed 86 Fed. (2d) 510, cert. denied 300 U. S. 670;

Ullrich v. Thomas, Receiver, First National Bank-Detroit, 86 Fed. (2d) 678, cert. denied 301 U. S. 692;

Brabb v. Thomas, Receiver, First National Bank-Detroit, 6167 In Equity, U. S. D. C. E. D. Mich.;

Wolf v. Schram, Receiver, First National Bank-Detroit, 111 Fed. (2d) 146, cert. denied 311 U. S. 651;

Davis v. Schram, Receiver, First National Bank-Detroit, 111 Fed. (2d) 144, cert. denied 311 U. S. 651;

Knapp v. Detroit Trust Co., et al., In Equity 8268, U. S. D. C. E. D. Mich.;

Cleveland v. First National Bank-Detroit, 606 U. S. D. C. E. D. Mich.;

Cleveland v. Delano, 2994 U. S. D. C. for the District of Columbia.

For a comprehensive summary of the Lucking litigation, see the opinion of the United States Circuit Court of Appeals for the District of Columbia in *Lucking v. Delano, Comptroller of the Currency*, 122 Fed. (2d) 21.

The bills of complaint in all three cases closely resemble each other. As a matter of fact, the complaint in the instant case, with a few minor exceptions, is verbatim identical with the complaint in the second Lucking case (129 F. (2d) 283) referred to above.

The petitioners herein are identical with the petitioners in the two prior cases above mentioned. In both prior suits the petitioners voluntarily instituted both of the complaints in the Federal courts, and solemnly represented therein to the Court that the Federal courts had proper jurisdiction over said controversies. In both of said previous cases the jurisdiction of the Federal courts was upheld and the complaints dismissed. Now in a final effort to circumvent these prior adjudications of the same controversies as involved herein, petitioners have filed a bill of complaint, which, as stated above, is almost verbatim identical with that of the second suit. And now petitioners just as solemnly represent to this Court that the Federal courts do not have jurisdiction over such an alleged cause of action. The purpose of petitioners is obvious.

All three cases center about a contract for the sale of approximately $105,000,000.00 worth of assets of the closed and insolvent First National Bank-Detroit in April 1933 to the newly organized National Bank of Detroit (R. p. 25). The instant suit, like the two previous ones, is brought as a derivative or class action allegedly on behalf of the creditors, depositors and shareholders of the insolvent First National Bank-Detroit to recover from the National Bank of Detroit for their benefit, the alleged good-will of the insolvent First National Bank-Detroit, which it is claimed was transferred to the new bank without consideration (R. pp. 23-24). Both of the prior suits, *Lucking v. Delano, supra,* were dismisset by the Sixth Circuit Court of

Appeals for failure of the complainants to show a proper demand upon the Receiver of the bank to bring action against the National Bank of Detroit, and because of the complainants' failure to show any unreasonable refusal upon the part of said Receiver to do so.

In an attempt to avoid the effect of these two earlier decisions of the Sixth Circuit Court of Appeals, the petitioners herein are merely endeavoring to obtain a third trial on the same issues by instituting the third complaint in the State Court. By stating in their third bill of complaint that they seek relief solely under the laws of Michigan, and not under the Federal laws, petitioners hope to render the case non-removable, and thereby by-pass the two prior Federal decisions above referred to.

This entire situation was well recognized by the Sixth Circuit Court of Appeals in the instant case, wherein it stated in its opinion (R. 131):

> **"The complaint sets out no material allegations to differentiate this action from those presented in the preceding cases, and the application of the rules there announced dispose of the instant controversy."**

ARGUMENT

THE WITHIN CASE IS PROPERLY REMOVABLE TO THE FEDERAL COURT

It is conceded by all parties that this is a derivative or secondary class action. It is brought by the petitioners to collect and obtain an accounting from the National Bank of Detroit with respect to a claimed asset of the closed and insolvent First National Bank-Detroit. Any recovery that might be effected would be for the benefit of all creditors, depositors and shareholders of the closed bank.

Under and by virtue of the National Banking Act, and particularly Sections 191 and 192 of Title 12 U.S.C., all assets of an insolvent national bank vest solely and exclusively in a receiver appointed therefor by the Comptroller of the Currency of the United States. Since such receiver is the only person, who, under the National Banking Act, in the first instance has the right to enforce such a cause of action as forms the subject matter of petitioners' complaint herein, and since such an action if brought by the receiver would obviously be one for winding up the affairs of an insolvent national bank, it must inevitably follow that a derivative action such as is presented herein must be brought for the benefit of the receiver of the closed bank because of his alleged refusal to act and, therefore, necessarily and inherently becomes an action for winding up the affairs of an insolvent national bank and is removable to the Federal Court.

The law is well established that the corporation, in whose name and for whose benefit a derivative or secondary class is brought, is not only a necessary but an indispensable party to such litigation. Furthermore, the

corporation in such a derivative action, although named as the defendant, is in reality the plaintiff.

See: *Davenport v. Dows,* 18 Wall. 626, 21 L. Ed. 938;
Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827.

It has long been established that the National Banking Act establishes a complete and exclusive statutory system for the establishment and government of national banks and for the administration of the liquidation of insolvent national banks.

Cook County National Bank v. U. S., 107 U. S. 445, 27 L. Ed. 537;
Davis v. Elmira Svgs. Bank, 161 U. S. 275, 40 L. Ed. 700;
Dietrick v. Greaney, 309 U. S. 190, 84 L. Ed. 694.

It is also the clearly established law that a receiver appointed by the Comptroller of the Currency to wind up the affairs of an insolvent national bank is the sole legal representative of the bank, and all of its creditors and shareholders. He is the only agent empowered by law to appear and act for the bank or its creditors and shareholders.

Bank of Bethel v. Pahquioque Bank, 14 Wall. 383, 20 L. Ed. 840;
Grindley v. First National Bank-Detroit, 87 F. (2d) 110, (C.C.A. 6th).

Since the within cause is a derative action, since the First National Bank-Detroit is not only an indispensable party to such an action but is the real party plaintiff, and since the receiver is the only agent or officer authorized to act for an insolvent national bank, it must follow that the within action is one for winding up the affairs of an insolvent national bank and hence removable to the

Federal Court. Whether an action involves the winding up of the affairs of a national bank depends not upon whether the receiver is or is not a defendant, but rests upon the allegations as they appear upon the face of the complaint. See *Dinan v. First National Bank-Detroit,* 117 F. (2d) 459, 460. Here too, the face of the complaint clearly reveals the within cause to be one for winding up the affairs of an insolvent national bank. Here the very controversy arose out of a contract for the sale of assets of the closed bank to a newly organized bank for the purpose of obtaining cash to make a pay-off to depositors of an insolvent bank. It would be difficult to imagine a controversy that more closely affected the winding up of the affairs of an insolvent national bank.

Finally, since an action which involves the winding up of the affairs of an insolvent national bank is an action arising under the laws of the United States, it is clearly removable to this Court under Sections 24 and 28 of the Judicial Code, as amended, and particularly sub-section 16 of Section 24 (U.S.C., Title 28, Sections 41 and 71).

Wichita Royalty Co. v. City National Bank, 95 F. (2d) 671, 674, (C.C.A. 5th);

Fleming v. Gamble, 37 F. (2d) 72 (C.C.A. 10th);

Fash v. First National Bank, 80 F. (2d) 110 (C.C.A. 10th);

Lawrence National Bank v. Rice, 83 F. (2d) 642 (C.C.A. 10th);

Dinan v. First National Bank, 117 F. (2d) 459 (C.C.A. 6th);

Guarantee Co. of North Dakota v. Hanway, 104 F. 369 (C. C. A. 8th);

McDonald v. State of Nebraska, 101 Fed. 171 (C. C. A. 8th).

THE GULLY CASE

A great deal of consideration is devoted by counsel for the petitioners to the case of *Gully v. First National Bank,* 81 F. (2d) 502; reversed in 299 U. S. 109, 81 L. Ed. 70, 57 Sup. Ct. 96.

The facts in the *Gully* case are rather simple. Certain state taxes had been levied against the shares of the First National Bank *of* Meridian prior to its failure. After the bank became insolvent and a receiver had been appointed, its assets were transferred to a new bank known as the First National Bank *in* Meridian. The new bank, in addition to other considerations for the purchase price, assumed all of the debts of the old bank. An action was brought by the tax collector of the State of Mississippi against the new bank to collect the taxes which had been levied against the stock of the old bank.

The suit was started in the State courts of Mississippi and a removal was sought to the Federal Courts upon two grounds: *first,* that the suit arose under the laws of the United States since the levy of a tax on shares of a national bank is possible only because of the express permission of a federal statute; and, *second,* that the suit was one for winding up the affairs of a national bank.

The Fifth Circuit Court of Appeals in the decision reported in 81 F. (2d) 502, held that although the case was not one for the winding up of the affairs of a national bank and hence was not removable on the second ground, it was properly removed on the first ground.

This Court held that since the plaintiff had injected no federal question into the case the same could not be introduced by the defendant, and hence the case was held not removable. The decision of the Sixth Circuit Court of Appeals is not in conflict with the *Gully* case and the *Gully*

case can be clearly distinguished from the instant case on at least two grounds: *First,* the cause of action which the Tax Collector sought to enforce in the *Gully* case was not one belonging to the insolvent bank or its receiver. It was not a derivative action brought on behalf of the closed bank or for the benefit of its stockholders and creditors. It was clearly an action by a third party to enforce a claim belonging only to that third party, which, if successful, would inure only to the benefit of said third party and did not, therefore, involve the winding up of the affairs of an insolvent national bank.

In the second place, on certiorari to this Court, the only point presented was whether the Fifth Circuit Court of Appeals had erred in holding the case removable as arising under the laws of the United States because of the federal statute granting to the several states the power to tax the shares of a national bank. The question of whether the cause involved the winding up of a national bank and was removable as such was not before this Court.

OTHER ARGUMENTS OF PETITIONERS RELATING TO REMOVABILITY OF SUIT

Petitioners also confusedly argue that the within cause is not properly removable because the defendants are residents of Michigan, and petitioners argue that only non-residents can remove such a controversy as is herein involved. Obviously, petitioners have misread Section 28 of the Judicial Code. The first sentence of said section relates to actions arising under the laws of the United States such as one for winding up the affairs of a national bank, and is not related to either the citizenship or the residence of the parties. The second sentence in said section of the Judicial Code, which requires non-residents as a prerequisite to removal, relates solely to suits other than those arising

under the laws of the United States and is generally referred to as applying to cases arising where there is a diversity of citizenship.

Petitioners also set forth the well known rule that the plaintiff may state his own cause and may determine upon what law he bases his right of recovery. Such cases as *Odell v. Farnsworth,* 250 U. S. 501, 63 L. Ed. 1111 and 1113, and others are cited in support of the proposition that since the petitioners have by their own complaint relinquished any claim to any recovery under federal law, the instant case is not one for winding up the affairs of a national bank and does not arise under the laws of the United States. The simple answer to this is that petitioners have overlooked that their case is framed as a derivative action and that whether they like it or not their action basically is one to recover a claimed asset of a closed national bank and hence arises under the laws of the United States. Therefore, respondent submits that the case is clearly removable to the federal court.

PETITIONERS' COMPLAINT WAS PROPERLY DISMISSED

The claim of petitioners has been before the federal courts three times. Three times the complaints have been dismissed by the District Court for failure of the complainants to show a proper demand and refusal upon the part of the receiver of the insolvent bank. Three times the decision of the District Court has been affirmed by the Sixth Circuit Court of Appeals. On the last two hearings before the Circuit Court of Appeals counsel for the petitioners herein did not even bother to appear and argue. The law supporting the dismissal of all three complaints is clearly set forth in the three opinions of the Circuit Court of Appeals, and no authorities are cited by the petitioners herein in support of their position.

CONCLUSION

We, therefore, submit that the petition for a writ of certiorari should be denied for the reasons set forth above.

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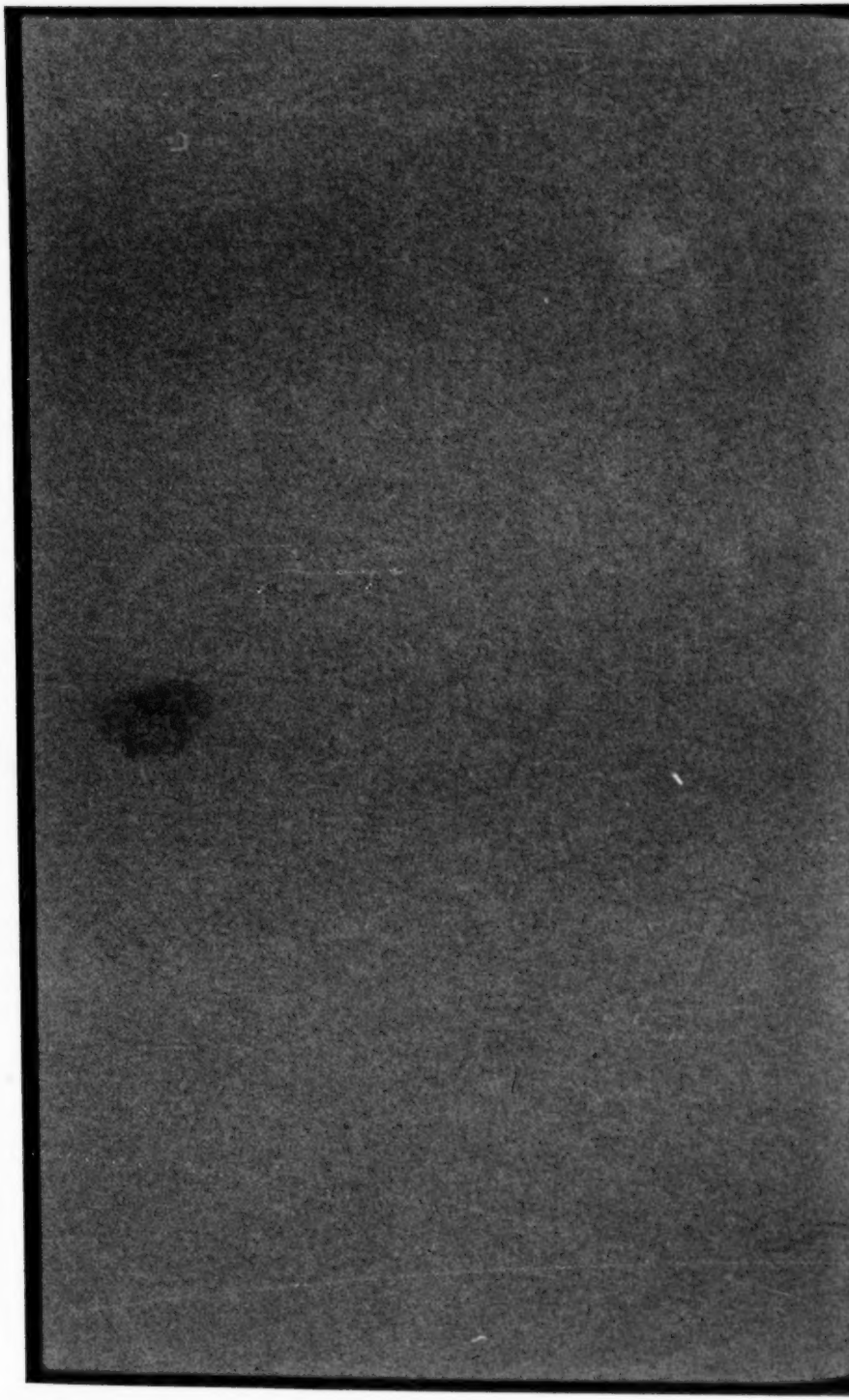
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RESPONDENTS.

BRIEF OF RESPONDENT, NATIONAL BANK OF DETROIT, IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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OPINION OF THE COURT BELOW

The opinion of the Sixth Circuit Court of Appeals is found in *Lucking vs. First National Bank-Detroit*, 142 F. (2d) 528.

STATEMENT OF THE CASE

This is a derivative or secondary class suit brought on behalf of the petitioners and all other depositors and stockholders of First National Bank-Detroit, an insolvent national banking association (R. pp. 2, 3). It seeks to attack certain transactions arising out of a contract of April 12, 1933, for the sale of certain assets of First National Bank-

Detroit by its conservator to this respondent. It is the third of a series of cases instituted by the petitioners against the respondents, the first two having been dismissed on motion and the dismissal affirmed by the Sixth Circuit Court of Appeals in *Lucking vs. Delano,* 117 F. (2d) 159 and *Lucking vs. Delano,* 129 F. (2d) 283.

The case is accurately stated and the authorities fully presented in the brief on behalf of respondent, First National Bank-Detroit. It would be supererogation to repeat those matters here. We merely point out certain matters in connection with the position of this respondent which were not covered in the brief of First National Bank-Detroit and certain other factors which we believe pertinent to the application for a writ of certiorari.

As in the two earlier cases, this respondent based its motion to dismiss the complaint in this case, not only upon the failure of the complaint to allege a demand and an unreasonable refusal on the part of the receiver, but also upon the failure to state a claim upon which relief might be granted (R. p. 61). Because of the dismissal for lack of capacity of the petitioners to maintain the suit, no opportunity was afforded to this respondent to argue its motion to dismiss for failure to state a claim (R. pp. 104-106, 109).

As appears, however, from the portion of the opinion of the District Court in the first case (Civil Action 1480) which is attached to the complaint in this case as Exhibit "D" (R. pp. 19, 21, 41), arguments on the failure to state a claim were presented to the District Court by this respondent in the first case. Since only a portion of the District Court's opinion in that regard appears in the printed record in this cause, we have taken the liberty of printing the opinion in the Appendix to this brief.

In the first case (Civil Action 1480) the District Court found that the only claim stated was that this respondent

had not filed certain accountings required by the contract, the exact nature of which was not clear. The District Court was "even a little doubtful about that." The first action, of course, was dismissed solely on the ground of the lack of demand, and this was the only point considered by the Circuit Court of Appeals in that appeal. 117 F. (2d) 159. The receiver in his letter of January 29, 1940, written after this decision of the District Court specifically informed petitioners that all accountings had been filed (R. pp. 84, 90). The second suit as well as the instant case were commenced after the receiver's letter was written and mailed, but the question of the sufficiency of the complaint to state a claim upon which relief might be granted has not again been argued because of the dismissal for failure to show a demand and an unreasonable refusal.

The only new question in this third case is whether the action was properly removed from the State Court to the Federal District Court.

In the complaints in the two earlier cases, both of which were originally instituted in the Federal District Court, petitioners had alleged the jurisdiction of the Federal Court as follows:

> "Jurisdiction of this Honorable Court rests upon (1) requisite amount in controversy, (2) necessary interpretation and application of different Acts of Congress pertaining to a National Bank Conservator's and Receiver's duties, powers and obligations, (3) the winding up of a National Bank, and (4) general equitable principles."

In an attempt to avoid these statements and to prevent the removal of this cause to the Federal courts in order to avoid the effect of the decisions of the Sixth Circuit Court of Appeals in the two earlier cases, the petitioners have made the following changes in their approach:

1. They have joined the closed bank, but not its Re-

ceiver, as a party defendant, and throughout the complaint have studiously attempted to avoid referring to the Receiver of First National Bank-Detroit by describing him as "agent" of the closed bank. However, the contract which they attach to their complaint as the foundation of their suit (R. p. 25), and a myriad of other references in their complaint, disclose that the transactions in question all occurred after the closing of the bank and the assumption of its custody by the Comptroller of the Currency.

2. They have abandoned, so they say, any claim that the original contract upon which they sue is invalid, and content themselves apparently with (a) an alleged "tort" claim for an alleged misappropriation of goodwill, and (b) a demand for an accounting, the nature, purpose and basis of which again are not clear.

3. They have inserted in their complaint a statement that they do not rely on any Federal law, but solely on the Common Law of Michigan (R. pp. 22, 23).

4. At the opening of the oral arguments on the petitioners' motion to remand and the respondents' motions to dismiss, counsel for the petitioners filed a so-called "dismissal" as to the closed bank (R. pp. 60, 95), without regard to the necessity for approval of such dismissal under Rule 23 (c) of the Rules of Civil Procedure for District Courts, and apparently without regard to the fact that the suit, if dismissed as to the closed bank, would fail in its entirety for lack of necessary parties.

The petitioners found no way of getting around the perfectly correct statements in their earlier complaints that this was an action for "the winding up of a National Bank."

ARGUMENT

Petitioners rely principally upon the removal question as the basis of allowance of the writ of certiorari, little attention being devoted to the propriety of the dismissal for lack of demand and an unreasonable refusal by the receiver. In fact in neither of the earlier two cases did the petitioners seek a review by this Court of the ruling of the Circuit Court of Appeals on the latter proposition.

The propriety of the removal is predicated upon two obvious propositions:

1. The action is one for the winding up of an insolvent national bank.

2. An action for the winding up of an insolvent national bank is an action arising under the laws of the United States, and hence may be removed from a State Court to the Federal Court without regard to the residence of the parties.

It is apparent that if there *is* a cause of action, it is the property of the closed bank or its receiver. The establishment or denial of that cause of action, if there is one, will establish or extinguish a valuable property right of the closed bank, and thereby swell or diminish the assets in the hands of the receiver or the Comptroller of the Currency to be administered and distributed pursuant to the National Banking Act. The situation, therefore, is the same as if the receiver were to sue upon a promissory note or to collect another debt or claim belonging to the insolvent bank, the proceeds of which would inure to the benefit of the depositors and stockholders and be distributed to them in accordance with the terms of the National Banking Act. That such a case would be one for the winding up of a national bank, there can be no doubt.

The character of the suit is emphasized by the fact that it arises (if at all) in relation to a sale of the assets of the

closed bank, made by its conservator after its insolvency to provide funds to pay a dividend to depositors (R. pp. 33, 34).

That an action for the winding up of a national bank is one of which the Federal District Courts are given original jurisdiction, there can be no doubt. *International Trust Co. vs. Weeks,* 203 U. S. 364, 366, 51 L. Ed. 224, 27 S. Ct. 69. The statutory grant of that jurisdiction is found in Section 24 of the Judicial Code (U.S.C., Title 28, Section 41) which provides in part:

> "The district courts shall have original jurisdiction as follows:
> * * *
>
> "(16) *Suits against national banking associations.* Sixteenth. Of all cases commenced by the United States, or by direction of an officer thereof, against any national banking associations, *and cases for winding up the affairs of any such bank.* * * *" (Italics ours.)

But the extent of the judicial power of courts of the United States is defined in Section 2 of Article III of the Constitution, the pertinent provisions of which read:

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The only clause of the foregoing section under which

federal courts may be given jurisdiction, original or otherwise, over the winding up of the affairs of an insolvent national bank is that relative to "Cases * * * arising under * * * the laws of the United States * * *." It follows that if the federal courts have original jurisdiction over cases for the winding up of national banks, they possess that jurisdiction only because such cases arise under the laws of the United States.

Section 28 of the Judicial Code (U.S.C., Title 28, Section 71) provides for the removal of causes as follows:

> "Any suit of a civil nature, at law or in equity, *arising under the Constitution or laws of the United States*, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, in any State court, *may be removed by the defendant or defendants* therein *to the district court* of the United States for the proper district. Any *other* suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being *nonresidents* of that State * * *." (Italics ours.)

Since this is clearly an action for winding up a national bank of which the district courts are given original jurisdiction, and as such is a case arising under the laws of the United States, it is apparent that it is removable under the first sentence of Section 28 of the Judicial Code without regard to the residence of the parties.

The petitioners by their petition in this Court raise only matters of federal law. They have failed to demonstrate in any manner that the decision of the Circuit Court of Appeals which they desire to have reviewed by this Court, in any manner conflicts with the decision of any other Circuit Court of Appeals or of this Court. They likewise

have failed in any manner to demonstrate that the decision of the Circuit Court of Appeals involves an important question of federal law which has not been but should be decided by this Court, since the principles involved have been established by a long series of cases.

It is respectfully submitted that the application for the writ should be denied.

Respectfully submitted,

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